No. 14,413

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES TESSEYMAN,
Appellant,

vs.

JOHN W. FISHER, LURENE W. FISHER, and UNITED STATES OF AMERICA,
Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Codes

Rules

Texts

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STATEMENT OF THE CASE AND OF THE APPEAL.

The appellant, Charles Tesseyman, has appealed to this Court of Appeals from an order of the United States District Court for the Southern District of California, Central Division, denying his motion for intervention as a party defendant, in an action brought by John W. Fisher and Lurene W. Fisher, as plaintiffs, against the United States of America, as sole defendant therein, to quiet title to certain real property and personal property located in San Luis

Obispo County, in the Southern District of California, upon which the United States of America has, or claims an interest or tax lien, under the Internal Revenue Laws of the United States, for an income tax deficiency against the appellant and applicant for intervention.

The action was commenced on June 4, 1953, by the filing of a complaint in the office of the clerk of the Superior Court of the State of California in and for the County of San Luis Obispo. (R. 8-14.) The complaint alleges, as a basis for the relief sought by the plaintiffs, that they are, and were at all times mentioned therein, the owners in fee simple of the property in litigation, and the defendant United States of America claims and asserts an interest in said property adverse to the ownership of plaintiffs (R. 8-9), and by Section 2410 of Title 28 of the United States Code it is provided that the United States may be named as a party defendant in a civil action or suit to quiet title. The complaint further alleges, that the defendant's claim which constitutes a cloud on the plaintiffs' title arises out of an income tax lien in favor of the defendant and against the appellant herein, Charles Tesseyman, for $31,037.54 which had been filed with the Recorder for the County of San Luis Obispo. (R. 12-13.)

In the complaint, plaintiffs allege their source of ownership of the property to be a judgment in their favor in an action brought by them in the Superior Court of the State of California in and for the County of San Luis Obispo against Charles Tesseyman and

others to recover the unpaid balance of the purchase price claimed to be due under a contract for the sale of the property, real and personal, for the lump sum of $155,000 (R. 10-11) and a sale of the property made to the plaintiffs under the judgment which was recovered after the tax lien was filed. (R. 11-12.)

Pursuant to a petition for removal of the action which was filed in the United States District Court for the Southern District of California, Central Division, by the defendant, United States of America, on June 29, 1953 (R. 3-5), the cause was removed and thereafter, on September 15, 1953 the defendant filed its answer in the action in the District Court to which it was removed. (R. 14-18.)

Defendant in its answer, denied that the plaintiffs are the owners of the property in controversy and, after admitting that it has, and claims, an interest in and lien upon the property adverse to plaintiffs, set forth the specific facts giving rise to such interest and lien; and as a separate and distinct defense, defendant alleged inter alia that the plaintiffs entered into an escrow for the sale of the property and authorized the completion of the escrow and the delivery of the title to the property to the purchaser upon receipt of consideration in excess of $120,000; that by the escrow transaction the taxpayer Charles Tesseyman acquired an interest in the property to which the lien of the United States against him attached; and further, the plaintiffs by having brought the action against him and others for the unpaid balance of the purchase price, treated the escrow as

having been completed and waived election to rescind the contract of sale; and prayed judgment:

> "that the Court adjudge the respective rights of the parties appearing in the action; that the property described in plaintiffs' complaint be sold as provided by law; that the proceeds of such sale be applied, first, to the expenses of such sale and that the balance of such proceeeds, if any, be applied in accordance with the priorities of the parties hereto as determined by law; * * *" (R. 14-18.)

On March 1, 1954, issues having been joined by the complaint and answer, the case was tried on the merits, and time fixed for the filing of briefs whereupon the cause was to stand submitted for decision. (R. 68.) On March 17, following, Charles Tesseyman, the appellant herein, filed his motion to intervene as a party defendant in the case. In his motion appellant alleged and stated as grounds therefor:

> "Charles Tesseyman moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and that any and all right, title and interest claimed by the plaintiffs in said action in regard to said property is founded and rests upon a judgment of a court of the State of California which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject matter and, also, to

have been procured by said plaintiffs through collusion and connivance with the Nash Building Company, Inc., and George H. Jovick, defendants in said state court action, and their attorney Courtney L. Moore, who is now appearing in his real role as the attorney for the plaintiffs Fisher in the above-entitled action, and by reason of such matters and things and conditions this applicant for intervention has a defense to plaintiffs' alleged cause and claim to relief against the federal income tax lien, presenting both questions of law and of fact which are common to the main action." (R. 19-20.)

A proposed answer setting forth an intervening claim and defenses supplemented by two exhibits, marked "A" and "B" with an exhibit accompanying the latter, marked "A", were filed jointly with said motion. (R. 21-55.) A copy of the proposed answer and exhibits, as they appear in the printed record, are set forth in an appendix to this brief.

The motion came up for hearing on March 29, 1954, and the minutes of the Court contain the following entry and order:

"Proceedings: For hearing on motion of Charles Tesseyman for leave to intervene as party-defendant.

"Plaintiff orally moves to strike motion of Chas. Tesseyman, and Court Orders that said motion of Chas. Tesseyman to intervene is Denied.

"It is Further Ordered that def't U.S.A. have 15 days from this date to file reply brief to plain-

tiff's brief heretofore filed, and plaintiff will either file a reply thereto or notify the Court they will not; whereupon on such advice from plaintiff's counsel, the cause will stand Resubmitted.

"Attorney for Chas. Tesseyman makes exceptions to the Court's ruling denying motion to intervene." (R. 66.)

Thereafter, on April 16, 1954, the District Court filed its Memorandum of Decision, and on May 25, following, Findings of Fact and Conclusions of Law were filed and a Decree Quieting (Plaintiffs') Title was filed and entered in the action. (R. 68.)

Upon this statement of the case, and the record in this cause, the appellant submits the following—

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THIS UNITED STATES COURT OF APPEALS HAS JURISDICTION TO REVIEW ON APPEAL THE ORDER APPEALED FROM, AS REQUIRED BY SAID COURT'S RULE 18.

1. Jurisdiction of the District Court is conferred by, and was invoked under, Section 1331, Section 1444, and Section 84(b)(2) of Title 28 of the United States Code. Section 1331 provides that the District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000, exclusive of interest and costs, and arises under the laws of the United States. Under Sections 1444 and 84(b)(2) the United States is given authority to remove this action from the Superior Court of the State of California, in and for the County of San Luis Obispo (where it was commenced), to the United States District Court for the

Southern District of California, Central Division, (to which it was removed and where it was pending and undetermined at the time of the application for intervention).

2. The order appealed from was entered on the 29th day of March, 1954, as appears from page 66, of the printed record herein. The notice of appeal was filed on the 28th day of April, 1954, as appears from page 67, of the printed record herein.

3. The statute believed to sustain appellate jurisdiction is Section 1291 of Title 28 of the United States Code, which provides that the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States except where a direct review may be had in the Supreme Court.

In this connection, it is to be noted, that the Federal Rules of Civil Procedure (Rule 24) regulating intervention divides intervention into two types: intervention of right; and permissive intervention. Denial of intervention as of right is appealable. See *Mack v. Passaic National Bank & T. Co.,* 3 Cir. (1945), 150 F. 2d 474; *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 91 L. Ed. 1646, 67 S. Ct. 1387. It has thus been held that an order denying leave to intervene is appealable where intervention was essential to preservation of applicant's rights (*Washington v. U. S.,* 9 Cir., 87 F. 2d 421, rev'g. 11 F. Supp. 675; *U. S. v. Radice,* 2 Cir., 40 F. 2d 445), and amounts to denial of relief (*Long v. Stites,* 6 Cir., 63 F. 2d 855).

Denial of permissive right to intervene is appealable for the trial Court's abuse of discretion. See *Palmer v. Guaranty Trust Co. of N. Y.* (1940), 2 Cir., 111 F. 2d 115; *American Brake Shoe & F. Co. v. Interborough R. T. Co.,* 2 Cir., 112 F. 2d 669; *Papaliolios v. Durning* (1949), 2 Cir., 175 F. 2d 73 (where the Court reversed the denial of a motion for intervention where the denial was not made in the exercise of discretion but on an erroneous conclusion of law); *Mullins v. DeSoto Securities Co.* (1943), 5 Cir., 136 F. 2d 55; *Deauville Associates v. Eristavi-Tchitcherine* (1949), 5 Cir., 173 F. 2d 745. See also, *Credits Commutation Co. v. U. S.,* 177 U.S. 311, 44 L. Ed. 782, 20 S. Ct. 636; *Allen Calculaters, Inc. v. National Cash Register Co.,* 322 U.S. 137, 88 L. Ed. 1188, 64 S. Ct. 905.

ERRORS RELIED ON.

An examination of many cases in which intervention has been granted or denied discloses that it is the accepted and usual practice of the forum, in granting or denying intervention, for the Court to render an opinion and decision which states the grounds or reasons for its action.

In the instant case, however, the District Court did not follow such accepted and usual course in denying the appellant's application for intervention. Nothing appears in the Court's order denying the application that in any manner indicates upon what ground or for what reason its action was predicated, the order

merely setting forth that the "motion of Chas. Tesseyman to intervene is Denied."

So here, without anything appearing in the order upon which any more specific error may be assigned, the only error assignable to the District Court's ruling must necessarily be, and it is limited to, that it erred in denying appellant's motion for leave to intervene.[1]

SUMMARY OF ARGUMENT.

The appellant's motion for intervention as a party-defendant and to file his proposed answer for relief, pursuant to Rule 24 of the Federal Rules of Civil Procedure and decisions of Federal Courts, regulating intervention, should have been granted.

The problems and propositions relied upon and presented to this Court by appellant, in support of the above contention, and all of which are related or incident to the alleged error of the District Court's order complained of, may fairly be summed up as follows:

Application for intervention in this quiet title action before final submission and decision was timely, the motion states the grounds therefor and was accompanied by a pleading, supplemented by exhibits, setting forth the cross-claims and defenses upon which intervention was sought and right of the appellant

[1]In fairness to the judge who presided in the District Court on the hearing of the motion, it may be permissible to remark that, he stated from the bench, it was denied on the ground that it was not made timely.

pro interesse suo was based and which are of a nature and status essentially such as are contemplated and provided for by Rule 24 of the Federal Rules of Civil Procedure as well as other grounds for intervention recognized and established by the United States Supreme Court; and all the well pleaded allegations of which pleading, on application for intervention, are taken as true. The Court was fully informed of the grounds on which the intervention was sought, including grounds based on the unsanitary condition of the hands of the plaintiffs, by which a defense in addition to the issues of the main action was presented.

The points made will be presented under headings as follows:

(1) The application for intervention in the instant quiet title action was timely.

(2) The intervention should have been allowed as matter of right.

(3) There are common questions of law and fact in the main action and in the proposed intervention, the granting of which would have neither unduly delayed nor prejudiced the adjudication of the rights of the original parties, and the District Court in the exercise of its discretion, and duty, should have permitted the intervention sought in this case under Rule 24(b) and firmly rooted principles of equity.

Most of the essential and physical facts and circumstances of the case appear in the statement of the case set forth in a preceding portion of this brief,

with record references, and the portion of the record (appellant's proposed pleading) which is set out in an appendix to this brief. Any necessary elaboration or statement of record matter vital to the ground of error which is made the basis of this appeal, or which may be necessary or conducive to a clear presentation or explanation of the points relied upon by appellant for reversal of the order from which the appeal herein was taken, and on which the decision of this cause depends, as well as to a lucid explanation of the relevancy, pertinency, force, and importance of such points in their bearing upon general law, principles of equity, and questions raised on the record, will be, and are, made in the course of the ensuing discussion of the case and argument.

ARGUMENT.

POINT ONE. THE APPLICATION FOR INTERVENTION IN THE INSTANT CASE TO QUIET TITLE WAS TIMELY.

The appellant's motion to intervene was filed pursuant to provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24 recognizes two categories, namely, intervention as a matter right; and permissive intervention in the discretion of the Court.[1] In either case the application must be timely, but the rule does not specifically set forth the time for intervention.[2]

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[2]Rule 24 of the Federal Rules of Civil Procedure provides:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right

An application for intervention, in a case of the nature as is the instant one, made after trial but before final submission of the cause for decision is timely. The right to intervene is not foreclosed where no decision or judgment has been entered in the case.

> "Parties who are not named may intervene and make themselves actual parties, so long as the proceedings are *in fieri* and are not definitely closed by the course and practice of the court."
>
> *Omaha Hotel Co. v. Wade,* 97 U.S. 13, 24 L.Ed. 917, at page 919.

In the next place, the timeliness of an application for intervention depends on the time of the particular proceeding to which the application relates and the origin of the right sought to be asserted by the intervention. *Missouri-Kansas Pipe Line Co. v. United States* (1941), 312 U.S. 502, 85 L.Ed. 975, 61 S.Ct. 666. In other words, the question whether or not a movant should be permitted to file an appearance as an interested party to be heard must ultimately

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to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. * * *"

rest upon the quality of the right he seeks to assert or defend in the particular case. *United States v. E. I. Dupont De Nemours & Co.,* 13 F.R.D. 487.

The record before this Court on this appeal, as previously pointed out, shows that the appellant sought leave to intervene as a party-defendant in the action, in order to assert against the plaintiffs the cross-claims and defenses set forth in his proposed answer, on the ground that he is the owner of a legal and equitable right, estate, interest and claim in and to the real property involved in the litigation and against which property the defendant United States as a tax lien claimant against the taxpayer and appellant Tesseyman is seeking, in this action, to enforce a tax lien under the internal revenue laws by foreclosure of the lien and sale of the property.

Appellant further alleged and stated, as a ground for intervention, that any and all right, title and interest claimed by the plaintiffs in this action in regard to the property involved in the litigation is founded and rests upon the validity of a judgment of a California Court which, on the face of the judgment-roll and the record in the action in which it was rendered and entered and otherwise, is shown to be null and void for lack of jurisdiction of the subject-matter and, also, to have been procured by said plaintiffs through collusion and connivance with Nash Building Company, Inc. and George H. Jovick, defendants in said state Court action, and their attorney Courtney L. Moore, who is now appearing in his real role as attorney for John W. Fisher and

Lurene W. Fisher, the plaintiffs in that and in the instant action. These features of the case will be further discussed with supporting authorities in later portions of this brief.

Rules providing for intervention are remedial and under the general rule the view is usually taken that such a rule should be liberally construed, in order to effect its purpose. For liberal construction in interpreting the rules with reference to intervention consult: *Brotherhood of Locomotive Engineers et al. v. Chicago, M. St. P. & P. R. Co. et al.,* 34 F. Supp. 594; *Securities and Exchange Comm. v. United States R. & I. Co.,* 310 U.S. 434, 84 L.Ed. 1293, 60 S.Ct. 1044; *United States v. C. M. Lane Lifeboat Co., Inc.,* 25 F. Supp. 410; Id. 2 Cir., 118 F. 2d 793; *Western States Mach. Co. v. S. S. Hepworth Co.,* (D.C.N.Y.) 37 F. Supp. 377, 67 C.J.S. 976-977. In *Western States Mach. Co. v. S. S. Hepworth Co.,* 2 F.R.D. 145 at page 146, with reference to Rule 24(a), the Court said:

> "This rule as well as all the other rules of the Federal Rules of Civil Procedure should be construed with great liberality as they were intended."

Furthermore, a rule of Court as to time for intervention obviously is inapplicable where the applicant had no notice or knowledge of the commencement or pendency of the action until about the time he filed his motion for leave to intervene. Here no claim has been made that the appellant herein did not make his application for intervention at the earliest oppor-

tunity or immediately after he became aware of the pendency of the action.

The case of *Senne v. Conley et al.,* 110 Colo. 270, 133 P. 2d 381, is authority for the view that where there is no statutory provision as to time within which application to be made a party to an action shall be made, a person who makes his application at the earliest possible opportunity is deemed to have made it in time. Similarly, the Court of another jurisdiction has held that where the right or privilege is given by statute, a requirement not expressly provided for by the statute will not be imposed in the absence of a cogent reason therefor. See *Massachusetts Bonding etc. Co. v. Novotny,* 200 Iowa 227, 202 N.W. 588.

Self-evidently, rules relating to and regulating intervention are not to be administered by varying, springing whims or caprices, or the unregulated discretion of the individual chancellor in the particular case. Of course, elevated and uniform justice could not be administered without rules. But in the last analysis, rules are not the ultimate end, the main thing; that main thing is justice itself. The rules are only in aid of the promotion of justice—the guideposts by which it is reached.

POINT TWO. THE INTERVENTION SHOULD HAVE BEEN ALLOWED AS A MATTER OF RIGHT.

The next problem that seems to require discussion is whether the appellant *pro interesse suo* was entitled to intervene as of right in the instant case. Inter-

vention of rights is predicated upon the principle that the interests of the intervener are such that he may suffer of his rights or some substantial prejudice thereto if he is not represented in the action. *Palmer v. Bankers Trust Company*, 10 Cir., 12 F. 2d 747.

Rule 24(a) deals with intervention of right and sets forth three grounds of such intervention of which only the second and third grounds are material here. Rule 24(a) (2) provides for intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment in the action"; and Rule 24(a)(3) recognizes the absolute right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the Court or of an officer thereof."

Any burden of showing why appellant should be permitted to intervene as a party-defendant, and that this was a proper case for intervention as a matter of right, under Rule 24(a)(2) or Rule 24(a)(3) or both, is met by contents of the plaintiffs' complaint, the answer of the defendant United States, and the appellant's proposed answer (of which a copy is set forth in an appendix to this brief).

In compliance with the requirement that on the application for intervention, the proposed complaint or answer must state a well pleaded claim or defense (*Continental & Commercial Trust & S. Bank v. Allis-Chalmers Co.* (D.C. Wis.), 200 F. 600), appellant with his motion tendered his proposed answer in which he set forth a statement containing a chain of

facts and circumstances in connected legal and logical form such as is required in good pleading, supplemented by exhibits, showing that the action is one which really and substantially involves adverse and valuable claims to property and property rights and defenses, personal to appellant, based on legal or equitable grounds or both, for the purpose of aiding the defendant United States to resist the claims and pretenses of the plaintiffs (Fisher) and to enforce its tax lien, as tax lien claimant, against appellant and the property in litigation and in the custody and control of the Court, and protecting an interest of his own which plaintiffs were seeking to suppress, conceal and evade, and as to which the defendant and its counsel were not familiar and it hardly seems necessary to add, would not, and could not, be adequately represented by the plaintiffs or their versatile counsel; and asking for affirmative and equitable relief, independent from that of the plaintiffs and the defendant in the original action.

It is to be observed, in connection with the allegations of appellant's proposed answer tendered with his motion, that it is well established that on the application for intervention, the well pleaded allegations of the proposed pleading will be taken as true. This statement finds support in *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*, 280 F. 934, and *United States v. Northern Securities Co.*, 128 F. 808.[3]

[3]In view of the rule that on application for intervention the well pleaded allegations of the proposed pleading will be taken as true, we have deemed it unnecessary, therefore, to expand this brief with an extended discussion of the nature, structure and

At the time when appellant filed his motion to intervene as a party defendant in this action to quiet title and for the enforcement and foreclosure of a federal income tax lien against him, the trial Court had custody and control of the real and personal property, either actually or constructively, the distribution or other disposition of which would have adversely affected appellant, who had a vital interest in the proper determination of the plaintiffs'

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contents of an affidavit (R. 56-64) made and filed by plaintiffs' counsel, Courtney L. Moore, in opposition to the motion for intervention in which attempt is made to join issue with allegations of the proposed answer tendered by appellant with his motion, with the intent to have the District Court dispose of the issues on the hearing of the motion in a summary manner, especially the allegations imputing fraud, collusion, connivance and practices on the part of Mr. Moore well within the realm of gross misconduct in procuring the judgment against the taxpayer and appellant Tesseyman which he has, as author of the complaint in the instant case, sought to make the basis of the plaintiffs' claim of ownership of the property in litigation and their right to relief from the federal tax lien against Tesseyman.

Whatever value the affidavit may have is in its admission that Tesseyman had commenced an action in the Superior Court, it being No. 17,745, as alleged in his proposed answer, by which the Court "acquired complete and exclusive jurisdiction" of the "real and personal property" and of "any and all rights and interests" claimed by the plaintiffs (Fisher) in a subsequent action, No. 17,800, commenced by them in the same Court, with respect to the same property and asserted claims and rights in relation thereto, in which the judgment pleaded by him for and in behalf of his clients, the Fishers, in the instant action, was recovered; and in showing that fraud, imposition, deceit and falsehood can only be maintained by persistence in practices, not less vicious than pernicious.

The rule seems to be that if fraud, oppression or undue influence is charged, the Court is not concluded by the record, but may inquire into the real facts of the transaction. *Woodcock v. Petroleum Corp.,* 48 Cal. App. 2d 652, 120 P. 2d 889. This concords with the principle that equity Courts possess broad powers and should exercise them so as to do substantial justice. So here, where the record contains an affidavit made and filed by an attorney which contains unqualified positive statements to the effect

status and right to any relief, as against the tax lien or otherwise, under well established rules of law and principles of equity.

If this Court will examine the answer accompanying the motion for intervention and proposed to be filed in the District Court, in detail, it will be found that facts and circumstances are stated which show not only that appellant had an interest in the subject matter of the litigation that he would gain

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that he had nothing whatever to do with the preparation or entry of a judgment which he has set up and pleaded in an action, as here, for relief, it may not be irregular or improper to quote an extract or two from the duly certified reporter's transcript of the record of proceedings had on the trial of the action in which the specific judgment was entered, to show what the actual and true facts are.

Mark the actual situation. On pages 104-104 of that transcript of the record, it appears as follows:

> "The Court. I think in this case the judgment should be for the plaintiff, and I think that you gentlemen, while you are here, should sit down and try to work out an equitable decree in this matter, and a judgment. Don't you think so?
>
> Mr. Moore. Yes, but I suggested to Mr. Muller I'd like—
>
> The Court. Prepare it and submit it.
>
> Mr. Moore. Yes, I think we more or less understand each other.
>
> * * * * * * *
>
> Mr. Kleefisch. We are not waiving findings, Your Honor.
>
> * * *
>
> The Court. All right, but I have indicated the type of judgment I want to make.
>
> Mr. Muller. Yes, I think I understand.
>
> The Court. You understand it, Mr. Moore?
>
> Mr. Moore. Yes, sir."

And what were the findings of fact that Mr. Moore prepared and had the Court sign, as a basis for the judgment? The clerk's certified transcript (page 46) shows them merely to be as follows: "I. That each and all of the allegations set forth in the complaint of plaintiffs on file herein are true. II. That each and all of the allegations and denials set forth in the answer of defendant, Charles Tesseyman, to the complaint of plaintiffs on file herein, inconsistent with the findings of fact stated in the preceding paragraph hereof are untrue."

or lose by the direct legal operation of the judgment, and that his interests were not adequately represented by existing parties, and further that he had property rights in the property in litigation not the least of which was the right of having it applied to the discharge and satisfaction of the federal income tax lien against him that would be affected by the Court's judgment and such as Rule 24(a) of the Federal Rules of Civil Procedure contemplate intervention for the assertion and protection of, but the intervention sought is not a conventional form of intervention whereby an appeal is made to the Court's good sense to allow a person having a common interest with the formal parties to enforce his common interest with his individual emphasis.

In *Missouri-Kansas P. L. Co. v. United States* (1941), 312 U.S. 502, 85 L.Ed. 975, 61 S.Ct. 666, the Supreme Court held that Federal Rule 24(a) is not a complete inventory of interventions allowable of right. And in *United States v. Columbia G. & E. Co.* (D.C. Del.), 27 F. Supp. 116, App. Dis. 108 F. 2d 614, cert. den. 309 U.S. 687, 84 L.Ed. 1030, 60 S.Ct. 887, the Court observed that Rule 24(a)(3) does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right.

Nothing is more firmly established than that possession by a Court of the res draws to that Court all controversies concerning the res. Hence, a Federal Court may, irrespective of other elements of Federal jurisdiction entertain an ancillary suit or proceeding

respecting property which is in the custody or control of the Court. The following are cited as supporting authorities:

Alexander v. Hillman, 296 U.S. 222, 80 L.Ed. 192, 56 S.Ct. 204;

Central Union Trust Co. v. Anderson County, 268 U.S. 93, 69 L.Ed. 862, 45 S.Ct. 427;

Hoffman v. McClelland, 264 U.S. 552, 68 L.Ed. 845, 44 S.Ct. 407;

Oklahoma v. Texas, 258 U.S. 574, 66 L.Ed. 771, 42 S.Ct. 406;

Rouse v. Letcher, 156 U.S. 47, 39 L.Ed. 341, 15 S.Ct. 236;

Wallace v. Fiske, 8 Cir., 80 F. 2d 897, 101 A.L.R. 726.

The subject is treated in an annotation in 134 A.L.R. 339.

In such case, it was held in *Central Union Trust Co. v. Anderson County,* supra, (296 U.S. 222), and *Hoffman v. McClelland,* supra, (264 U.S. 552), third persons claiming interests in or liens upon the property may be permitted to come into that Court for the purpose of setting up, protecting, and enforcing their claims, although the Court could not consider or adjudicate their claims if it did not have custody of the property. See also, *White v. Ewing,* 159 U.S. 36, 40 L.Ed. 67, 15 S.Ct. 1018. In the *Hoffman* case the Court said the power to deal with such claims is incident to the jurisdiction acquired in the main action and may be invoked by way of intervention in which case the proceeding is purely ancillary.

And it is noteworthy that the rule that jurisdiction of Federal Court over the main action will sustain jurisdiction of an ancillary or supplemental proceeding is frequently applied to proceedings on judgments and decrees. Consult *Dugas v. American Surety Co.,* 300 U.S. 414, 81 L.Ed. 720, 57 S.Ct. 515; *Local Loan Co. v. Hunt,* 292 U.S. 185, 45 L.Ed. 1230, 54 S.Ct. 695, 93 A.L.R. 195; *New Orleans v. Fisher,* 180 U.S. 185, 45 L.Ed. 485, 21 S.Ct. 347. Illustrative of this is *Johnson v. Christian,* 125 U.S. 642, 31 L.Ed. 820, 8 S.Ct. 989, an action to prevent enforcement of the judgment or decree, and *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.,* 198 U.S. 188, 49 L.Ed. 1008, 25 S.Ct. 629, an action to determine whether or not the Court had jurisdiction to render it.

In the case of the *United States v. C. M. Lane Lifeboat Co., Inc.,* 25 F.Supp. 410, intervention of an individual as an interested party defendant was granted pursuant to Rule 24, on the ground that although a judgment would not directly bind him, it would in the last analysis do so indirectly.

In the case of *Root Refining Co. v. Universal Oil Products Co.,* 3 Cir. (1948), 169 F. 2d 514, a motion to intervene was made in a proceeding to vacate judgments of the Court of Appeals on the ground of fraud and in granting the application the Court applied the principles underlying the Federal Rules of Civil Procedure which regulate intervention in the District Courts. There the Court stated:

> "This court is entitled to whatever assistance is available to it in its effort to unearth the truth and it is of no moment that Whitman's

application may not have been promptly presented after it was informed as to the facts, since, as pointed out in Hazel-Atlas Glass Co. v. Hartford Empire Co., 332 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250, the matter does not merely concern private parties and issues of great moment to the public are at stake."

It is to be remembered that the intervention in the instant action was sought on the ground, among others, that the judgment and judicial sale set up and relied upon by the plaintiffs Fisher as a basis for their claim of title and ownership to the property as to which they sought quiet title and relief from a federal tax lien was null and void, on the face of the judgment-roll and record in the action in which it was rendered, for lack of jurisdiction of the Court of the property which was the subject matter of the action and to render the particular judgment decreeing specific performance of a contract for the sale of real property and personal property for a lump sum. Specific performance and foreclosure of vendor's lien does not lie under such a contract. Consult *Welch v. Farmers L. & T. Co.,* 165 F. 561 at 567 where the rule in such cases is stated. The California rule, in its statement, is not different from that there stated. Cf. *Laske v. Lampasona,* 89 Cal. App. 2d 284 at 285, 200 P. 2d 87; *Anderson v. Permenter,* 78 Cal. App. 2d 378, 177 P. 2d 818; *Wehen v. Lundgaard,* 41 Cal. App. 2d 610, 107 P. 2d 491. "The doctrine of vendor's lien applies only to sales of real estate." *Wabash, St. L. etc. R. Co. v. Hamm,* 114 U.S. 587, 29 L.Ed. 235, 5 S.Ct. 1081. The subject is exhaustively discussed

with copious citation of authorities in an annotation in 88 A.L.R. 92.

But this is not all. The record shows that the Court lacked jurisdiction and power to deal with the subject matter of the action in which the judgment pleaded was procured. At the time that action was commenced by John W. Fisher and Lurene W. Fisher, who were the plaintiffs therein, and the parties plaintiff in the instant action, an action in equity had been commenced and was then pending and undetermined in the same Court wherein Charles Tesseyman was plaintiff and the said plaintiffs (Fisher) were defendants, and the Court had acquired exclusive jurisdiction and control of the same real and personal property and transaction in escrow with respect thereto, as was sought to be made the subject matter of the subsequent action, and both Fisher and his wife had been served with a copy of summons and complaint in the prior action so that the Court had acquired jurisdiction not only of the subject matter therein but of the person of said Fisher and of his wife.[4]

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[4]It appears from the printed record herein, at page 45, and in the appendix to this brief that the appellant, Tesseyman, as a defendant in the subsequent action, in his answer filed therein, and as a separate and distinct defense thereto, pleaded the pendency of his prior action in equity wherein he set forth and alleged facts showing that the subsequent action was brought upon and with respect to the same real and personal property and transaction in escrow mentioned in the complaint in his prior action (which also appears in the printed record herein, at pages 30-43 as part of appellant's proposed answer in the instant case), and that Fisher and his wife had been served with copy of summons and complaint therein and also, that the "court in said action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made".

It may not be amiss to here again point out that the plaintiffs' counsel, in his affidavit by which he attempted to join issue with some of the allegations of the appellant's proposed answer in the instant case, concedes that the Court in the Tesseyman action "acquired complete and exclusive jurisdiction" of the "real and personal property" and of "any and all rights and interests" which were claimed by the plaintiffs (Fisher) in the subsequent action commenced by them in the same Court, with respect to the same property and asserted claims and rights in relation thereto under the same transaction and escrow which was the subject matter of the prior action commenced by Tessyman, and in which Fisher and his wife were defendants.

It can readily be seen that the pleading tendered by appellant with his motion stated a good cross-claim and defenses which posed problems of substantive law, to be heard on the merits and such as could not be disregarded or disposed of upon a hearing of the motion for intervention.

We maintain and submit that under the authorities and the record circumstances and facts in the present case, with the circumstances surrounding it, and for the reasons herein stated and made to appear, the intervention sought was one of absolute right under the rules and decisions. For the same reasons it was ancillary to the main action. So much for this matter. We leave it with this comment: Whatever the question raised, it is not one of fact but of law.

POINT THREE. THERE ARE COMMON QUESTIONS OF LAW AND FACT IN THE MAIN ACTION AND IN THE PROPOSED INTERVENTION, THE GRANTING OF WHICH WOULD HAVE NEITHER UNDULY DELAYED NOR PREJUDICED THE ADJUDICATION OF RIGHTS OF THE ORIGINAL PARTIES, AND THE DISTRICT COURT IN THE PROPER EXERCISE OF ITS DISCRETION, AND DUTY, SHOULD HAVE PERMITTED THE INTERVENTION SOUGHT UNDER RULE 24(b), AND FIRMLY ROOTED PRINCIPLES OF EQUITY.

Having considered the appellant's motion for intervention from the standpoint of his right to intervene as matter of right, we turn to the question raised by the motion, i.e., should appellant have been permitted to intervene under the provisions of Rule 24(b)? Incident to this is the question whether the District Court abused its discretion in denying permissive intervention.

Rule 24(b) concerns itself with permissive intervention, and provides among other things that upon timely application anyone may intervene when the applicant's claim or defense and the main action have a question of law or fact in common. And, it further provides that in exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As has already been shown, appellant in his motion alleged and stated, as a ground for intervention, and as provided for by Rule 24(b)(2), that his defense to plaintiffs' claim and alleged cause for equitable relief, presents both questions of law and of fact in common with the main action. "In construing this section of the Rule", it is said in *Kind v. Markham*

(D.C. N.Y.), 7 F.R.D. 265, at page 266, "the courts have treated it as contemplating a situation in which the intervener, even though asserting a claim or defense common in law or fact to the main action, presents a claim in addition to the main suit."

While something more than trial convenience is here involved, there is no requirement that appellant have a direct interest in the litigation. In *Securities and Exchange Comm. v. U. S. Realty & Imp. Co.,* 310 U.S. 434, at page 459, 84 L.Ed. 1293, 60 S.Ct. 1044, at page 1055, the Court in speaking of Rule 24(b)(2), said:

> "This provision plainly dispenses with any requirement that the intervener shall have a direct personal or pecuniary interest in the subject of the litigation."

Here the allegations of the proposed answer accompanying the motion raised new issues and appellant's presence in the case in view of those allegations and the relief asked for, would not have caused any substantial delay, and at the same time would aid the Court in determining the ultimate issue in the case at the threshold of which is the primary and fundamental issue whether the Fishers, as plaintiffs, have come into a Federal Court seeking equitable relief with "unclean hands", and there is no showing of any prejudice. The allegations of the proposed answer challenging the plaintiffs' right to equitable relief owing to their unclean hands are proper defenses. *Folberth Auto Specialty Co. v. Trico Prod. Corp.* (D.C. N.Y.), 10 F. 2d 365. And it has been held in effect that a pleading

such as the answer proposed to be filed in the District Court, and praying for relief against a judgment and judicial sale, states a proper case for relief in equity. See *Shelton v. Tiffin,* 6 How. (U.S.) 163, 12 L.Ed. 387. And in *Byers v. Surget,* 19 How. (U.S.) 303, 15 L.Ed. 670, the Supreme Court said that a court of equity may take cognizance of any fraudulent conduct of the parties in obtaining the judgment, or in attempting to avail themselves thereof. See also *Marshall v. Holmes,* 141 U.S. 589, 35 L.Ed. 870, 12 S.Ct. 62.

In other words, in the instant case appellant was not merely attempting to reassert precisely the same defense that was being asserted by the defendant United States as tax lien claimant against but additional and independent defenses such as have their foundation deeply rooted in equity jurisprudence, and although it was inevitable that some delay, however short, would be occasioned by appellant's cross-claims and defenses, nevertheless when such delay is considered along with the fact that appellant's intervention would materially add to the defense against plaintiffs' claims and unmask and expose to equitable scrutiny the insidious devices, no less evil than wicked, by which the judgment was procured under which they claim and pretend to be the owners of the property in litigation, and the further fact of equal if not greater significance, appellant's intervention would have aided in protecting the integrity of the Court under the "clean hands" doctrine.

The "clean hands" rule is the most important rule affecting the administration of justice, and is invoked on grounds of public policy and for the protection of the Court. It is contrary to equity that a party should be permitted to enjoy unmolested that particular property, the possession of which he sought to secure, and did secure, by his wrongful acts (*Angle v. Chicago, St. P. M. & O. R. Co.,* 151 U.S. 1, 38 L.Ed. 55, 14 S.Ct. 240), and any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient for the invocation of this maxim. (*Precision Instrument Mfg. Co. v. Automotive M. Mach. Co.,* 324 U.S. 806, 89 L.Ed. 1381, 65 S.Ct. 993.) The doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith, which presupposes a refusal on its part to be an abettor of inequity (*Precision Instrument Mfg. Co. v. Automotive M. Mach. Co.,* supra; and in an equitable action it is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard (*DeGarmo v. Goldman,* 19 Cal. 2d 755, 123 P. 2d 1). To the same effect are *General Theatres v. Metro-Goldwyn-Mayer Dist. Corp.,* 9 F.Supp. 546, and *Bell & Howell v. Bliss,* 262 F. 131. In the *General Theatres* case it is said that at whatever stage of the proceedings it is disclosed, the Court will of its own motion apply the maxim that he who

comes into equity must come with clean hands. And in the *Bell & Howell* case it is said that the Court will do so because of interest to the public. So in *Colonial Book Co. v. Oxford Book Co.*, 2 Cir., 135 F.2d 463, aff'g 45 F.Supp. 551, the Court said the maxim should be applied for the advancement of right and justice.

Permissive intervention, of course, rests within the sound discretion of the District Court under Rule 24(b) to make whatever disposition of the application is just in the light of the facts of the particular case. Discretion does not mean caprice. A right measured by a capriciously regulated yardstick would present a false measure of equitable right.

Here there is something more than trial convenience involved. It is doubtful that there would have been any substantial or material delay, and there is absolutely no showing of prejudice that would result by the intervention. Here the unconscionable acts of the plaintiffs have immediate and necessary relation to the equity that they seek and in some measure affect the equitable relief sought by them in respect of property brought before the court for adjudication as to the ownership thereof.

Under such circumstances appellant insists, and submits, there was an abuse of discretion in denying him leave to intervene as a party defendant. There exists a question of law and fact common alike to the principal action and to the proposed cross-claim and defenses, and the proposed answer presents a claim and defense in addition to the main action.

It is therefore respectfully submitted that the order of the District Court of the United States for the Southern District of California, Central Division, from which the appeal herein was taken, for the reasons and errors herein specified and shown, should be reversed, and the cause remanded with such directions as this Court may deem the nature and exigencies of the case to require.

Dated, San Francisco, California,
December 13, 1954.

HENRY J. KLEEFISCH,
Attorney for Appellant.

(NOTE): Since the appeal herein was taken the defendant United States of America has appealed to this Court of Appeals from the judgment of the District Court entered in the original action in favor of the plaintiffs John W. Fisher and Lurene W. Fisher and against the said defendant. It is the opinion of the appellant's counsel that the two appeals present questions of law and of fact common to both of them and in the interest of justice should be heard and determined together.

(Appendix Follows.)

Appendix.

Appendix

[Title of District Court and Cause.]

(R. 21-55.)

INTERVENER'S ANSWER

First Defense.

1. Intervener admits the allegations stated in paragraphs numbered 1, 2, 4, and 5 of the plaintiffs' complaint herein; denies the allegations in paragraph numbered 3, and denied the allegations in paragraph numbered 7 insofar as they assert that the United States of America is estopped from asserting any right or claim it has or might have under the Internal Revenue laws and regulations and its tax liens against this intervener, Charles Tesseyman, either severally or jointly with Elaine Tesseyman, his wife.

2. Intervener admits that an income tax lien in favor of the defendant United States of America and against this intervener for $31,037.54 and against Elaine Tesseyman for $21,568.43 was filed in the office of the Recorder for the county of San Luis Obispo, State of California, on April 27, 1950, as in paragraph 6 of plaintiffs' complaint alleged, and this intervener further answers the allegations and matter set forth in said paragraph 6 as follows:

(a) He denies that on March 23, 1949, or thereabouts the plaintiffs herein, John W. Fisher and Lurene W. Fisher, or either of them, agreed to sell to the Nash Building Company, Inc., a corporation,

the real property or the personal property described in paragraph 3 of their complaint herein, and alleges and says that on and prior to the 17th day of February, 1949, the said plaintiffs were the owners only of a three-fourths interest in said property, and Cleo S. Clinton and Loretta I. Clinton were the owners of the other one-fourth interest in said property, and all of them had made and executed and deposited with the Title Insurance and Trust Company, at its office in the city of San Luis Obispo, a deed to said real property to said Nash Building Company, Inc., together with a bill of sale to the said personal property, and the said Nash Building Company, Inc., had made and executed with a title company a deed to said real property to this intervener, Charles Tesseyman, together with a bill of sale to said personal property, for the purpose and object of inducing and inveigling this intervener to make and execute, and to deliver, to said Nash Building Company, Inc., the title papers necessary to transfer to it and by which he did transfer and convey to it the title and ownership of certain real property and personal property situate in the city and county of San Francisco, state of California, of the fair and reasonable market value of $165,000, and which was subject only to an encumbrance of $56,000.00;

Thereafter, and on or about the 23rd day of March, 1949, and after the property so obtained from this intervener had been disposed of by and through the said Nash Building Company, Inc., a form or manner of agreement purporting to be an agreement of

sale and purchase between the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, as the apparent sellers, and the Nash Building Company, Inc., as apparent buyer, was made up and prepared by said Title Insurance and Trust Company and was signed by the said parties thereto; that said alleged agreement consists entirely of escrow instructions and was so made up and prepared by said title company at the special instance and sole direction of George H. Jovick, the president and one of the only two stockholders of the said Nash Building Company, Inc.; that said alleged agreement contemplated the sale and purchase of said real property and personal property including stock-in-trade for a lump sum and at all times was and is such that it could not be specifically enforced nor made the basis of an action for foreclosure of a vendors' lien for the unpaid purchase price of land, in equity, for the reason stated herein that it undertakes and contemplates the sale and purchase, and on its face shows itself to be a contract in form for the sale and purchase, of real property and personal property including stock-in-trade, for a lump sum of $147,500.00.

(b) Intervener admits that on April 11, 1949, said alleged agreement of sale and purchase was amended and he alleges that Cleo S. Clinton and Loretta I. Clinton then were fully paid for their one-fourth interest in and to said property and they were so paid by and with moneys obtained by said Nash Building Company, Inc., and the plaintiffs herein from the sale and disposition of the property obtained from this

intervener as hereinbefore set forth and alleged, and thereupon the said Clintons ceased to have any rights or interest in the real property involved in this litigation, or under the said alleged agreement and escrow. He admits that on and under date of April 21, 1950, an action was commenced in the superior court of the state of California, in and for the county of San Luis Obispo, by plaintiffs herein, John W. Fisher and Lurene W. Fisher, as alleged and purported sole owners of the property involved in this litigation, and against the Nash Building Company, Inc., and George H. Jovick and this intervener, and that they caused a notice of the pendency of said action to be recorded as in their complaint herein alleged; and this intervener alleges and says that said action was one in equity for the specific performance of aforesaid alleged agreement of sale and purchase of both real property and personal property including stock-in-trade for a lump sum as aforesaid, and was and is numbered No. 17,800 upon the records of said superior court. He denies that by reason of any fact, and that by reason of any condition, and that by reason of the facts and conditions set forth in the plaintiffs' complaint herein, they had any cause of action or any ground for invoking the aid of a court of equity in said action No. 17,800, or upon which the equitable jurisdiction of the court could or did attach; that prior to and at the time of the commencement of said action No. 17,800 this intervener had commenced and there was then pending in said superior court an action, in equity, to determine rights, claims and in-

terests in and to said real property and said personal property asserted by the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Company, Inc., and the latter's two stockholders, George H. Jovick and Leonard R. Jacobson, adverse to this intervener, and to compel the delivery by them to him of the title papers to said real and personal property that said action was commenced by this intervener on March 10, 1950, and was and is numbered No. 17,745 upon the records of said superior court and concurrently with the commencement of said action he caused a notice of pendency of said action, its nature, purpose and object, to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California; a copy of the complaint in said prior action No. 17,745 is attached hereto, marked Exhibit A, and made a part of this answer; that in and by said action No. 17,745 the said superior court acquired complete and exclusive jurisdiction of the said real property and personal property and of any and all rights and interests claimed by the plaintiffs in the subsequent action No. 17,800 and herein with respect to said property; that prior to the commencement of the latter action by them they had been served with a copy of the summons and complaint in said prior action and thereafter appeared and submitted their alleged claims to the court in said action.

Intervener further alleges and says that he appeared and filed an answer in said action No. 17,800 wherein he denied all the rights and equities under-

taken to be set up and claimed by the said John W. Fisher and Lurene W. Fisher, the plaintiffs therein, and he specifically alleged and pleaded by way of defense that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of the complaint in said action and the exhibits attached thereto, to exist as to either the said real or personal property, the only agreement in respect of which specific performance was thereby sought being the alleged escrow agreement hereinbefore described, purportedly for the sale and purchase of real property and personal property including stock-in-trade, for a lump sum; and, also, the commencement and pendency of the said prior action No. 17,745 a copy of said answer is attached hereto, marked Exhibit B, and made a part of this answer.

(c) Intervener admits that on or about the 22nd day of December, 1950, the said came on to be heard in said superior court upon the issues joined by the complaint and answer of this intervener, the Nash Building Company, Inc., and George H. Jovick not having appeared and filed any pleading and their default for failure so to do was entered, and a form and manner of trial was had in said cause, the trial judge permitting this intervener to introduce in evidence the record and files of the court in said prior action, but denying him the right to establish any right or claim to said real and personal property that would tend to defeat the plaintiffs' claim and informing this intervener that he could do that in his

own action then pending in said court and on its calendar for trial;

That at the time of the trial of said action No. 17,800 and at the time of the rendering and entry of judgment therein, and for a long time prior thereto, Courtney L. Moore, the attorney of record for the plaintiffs herein, at all of said times was and still is an attorney at law for the said Nash Building Company, Inc., and its president George H. Jovick, and although he permitted a default to be entered against them in said action as hereinbefore stated, he appeared purportedly as the attorney for said defaulting parties on the trial and asked for and was granted leave to participate in the proceedings and soon undertook the prosecution of the action in the plaintiffs' behalf in cooperation, collusion, and association with A. V. Muller who appeared as their nominal attorney, and at the close of the trial made and prepared the findings of fact and conclusions of law which he presented to and had the trial judge sign as his decision in said cause, and this intervener is informed and verily believes and therefore alleges and charges that said action No. 17,800 was instituted by the plaintiffs herein by and through their collusion, connivance, confederation and conspiracy with the said Nash Building Company, Inc., and its president George H. Jovick, as part of a plan and scheme conceived by the said Courtney L. Moore and A. V. Muller, to cast the said Nash Building Company, Inc., in judgment upon the aforesaid alleged agreement of sale and purchase, for the purpose and object cheat-

ing and defrauding this intervener out of his rights, estate, interest and claim in and to said real property and said personal property and calculated to cut off and eliminate the income tax liens against said rights, estate, interest and claim of this intervener and taxpayer and of his wife Elaine in and to said property. He denies that any, and he denies that all, the circumstances alleged in said paragraph 6 in said complaint herein, vested the plaintiffs with the title to said property or any title or right sufficient in law or in equity to appear and ask for any relief herein.

Second Defense.

The complaint fails to state a claim or right of action against the defendant United States of America upon which relief can be granted.

Third Defense.

The plaintiffs John W. Fisher and Lurene W. Fisher in seeking equitable remedy and relief herein did not come into equity with clean hands; the Nash Building Company, Inc., was at all times material to their action No. 17,800 in the superior court set forth and alleged in their complaint herein, subservient to them, and its president, George H. Jovick, and the acts of said corporation, and the participation of said corporation in the acts, transactions, and litigation, in the plaintiffs' complaint herein and in this answer set forth and alleged, ought in fairness and good conscience to be deemed to be the acts and participation of said plaintiffs, John W. Fisher and Lurene W.

Fisher, and their attorney Courtney L. Moore, equity looking beyond the mere form that characterizes the procedure.

Fourth Defense.

Said alleged judgment of the superior court of the state of California in and for the county of San Luis Obispo, so procured and made and entered in said action No. 17,800 as aforesaid, and all proceedings and rights, predicated thereon, were and are null and void, on the face of such judgment, and the judgment roll in said action, for lack of jurisdiction of the subject matter, and from the want of power to grant relief contained in the judgment.

Wherefore, this intervening defendant having fully answered to the complaint, denies that the plaintiffs are entitled to the relief demanded, or any part thereof, and he prays that the judgment in the action No. 17,800 above described be declared, adjudged and decreed to be null and void, and for other proper relief.

H. J. Kleefisch,
Attorney for Intervener.

Duly verified.

EXHIBIT "A"

In the Superior Court of the State of California in and for the County of San Luis Obispo

No. 17745

Charles Tesseyman,
Plaintiff,

vs.

John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson, Nash Building Co., Inc., California Pacific Title Insurance Company, and Title Insurance and Trust Company,
Defendants.

COMPLAINT

(Declaratory Relief, etc.)

Plaintiff complains of the defendants and for cause of action alleges, that:

1. At all times herein mentioned the defendants John W. Fisher and Lurene W. Fisher were and now are husband and wife and plaintiff is informed and believes and upon such information and belief alleges that at all times herein mentioned the defendants Cleo S. Clinton and Loretta I. Clinton were and now are husband and wife.

2. At all times herein mentioned each of the defendants California Pacific Title Insurance Company,

Title Insurance and Trust Company, and Nash Building Co., was, and now is, a domestic corporation, incorporated under the laws of the state of California.

3. During all of the time and times herein mentioned the defendants George H. Jovick and Leonard R. Jacobson have been, and at all the various times where they or the said George H. Jovick are or as hereinafter mentioned were, and still are, jointly and cooperatively conducting and transacting business and real estate operations and exchanges by and through the agency and instrumentality, and in and under the name, of Nash Building Co., Inc., one of the defendants herein.

As now and during all of said time and times they have always controlled and named, and they, said George H. Jovick and Leonard R. Jacobson, do now control and name, by and through the ownership and control of all or substantially all of the issued shares of stock of said Nash Building Co., Inc., the directors and officers of said company, and the said defendants have always been and now are in full possession, control and dominion of the affairs, business and property or whatever it may be of said defendant company, as plaintiff is informed and believes and therefore alleges, and have conducted, operated and controlled the same, as now, agreeable to their own interests, their own conveniences, their own resolves, and their own advantages and gains.

4. On February 10, 1949, the plaintiff was, and for a long time prior thereto had been, the owner and in possession of certain real property situate in the city

and county of San Francisco, state of California, described as:

> Beginning on the Southerly line of Eddy Street at a point distant thereon 137 feet and 6 inches from the Westerly line of Mason Street; running thence Westerly along the Southerly line of Eddy Street 55 feet; thence at a right angle Southerly 137 feet and 6 inches; thence at a right angle Northerly 137 feet and 6 inches to the point of beginning;

with the building and improvements thereon consisting of a hotel building containing about 120 rooms, together with the furniture, furnishings, fixtures and equipment located and contained in or about said hotel building and premises, which said real and personal property then was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness amounting to $65,000.00, and which property was and is known as the "Dunloe Hotel" and is hereinafter sometimes referred to as the "Dunloe Hotel property."

5. The defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton were, on the 10th day of February, 1949, and for a long time prior thereto, the owners and in possession of certain real property located on 101 Highway and situate partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and hereafter described; together with the buildings and improvements thereon and the furniture, fixtures and equipment located and con-

tained in or about said buildings and premises, which said property was and is known as "Motel Inn" and is hereinafter sometimes referred to as the "Motel Inn property." On said 10th day of February, 1949, the said Motel Inn property was subject to and security for the payment of a deed of trust and chattel mortgage indebtedness in the principal sum of $46,-032.01 with interest thereon at the rate of five (5%) per cent per annum.

6. On and prior to the 10th day of February, 1949, the defendant George H. Jovick had suggested and proposed to plaintiff that plaintiff trade and exchange his said Dunloe Hotel property hereinabove described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said property in the amount of $56,000, for the said Motel Inn property hereinabove mentioned and hereinafter described, subject to the aforesaid deed of trust and chattel mortgage indebtedness against said last mentioned property in the amount of $46,032.01, together with the on-sale general liquor license issued by the State Board of Equalization of the State of California for the sale and dispensing of alcoholic beverages on said premises, and said George H. Jovick had informed plaintiff that such exchange and trade could be made, on said terms, provided that the exchange and trade could be made, on said terms, provided that the exchange and trade be carried out and consummated by the plaintiff and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton making and executing, and depositing in es-

crow, the necessary instruments to transfer and convey to the defendant Nash Building Co., Inc., as an intermediate title holder, transferee, grantee, or "dummy," the title to their respective property involved, except the said liquor license, which was to be directly transferred to plaintiff, because the said defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton so insisted, directed and required; and, that, the plaintiff had notified the said George H. Jovick that he would make and consummate, and was ready to make and consummate, said exchange and trade of properties, on said terms and in said manner.

7. Pursuant to the terms and conditions of the aforesaid oral arrangements and understandings, for the exchange of said Dunloe Hotel property for said Motel Inn property, the plaintiff executed and acknowledged before a notary public, a deed and a bill of sale wherein the defendant Nash Building Co., Inc., was and is named as the grantee and vendee, respectively, and describing and conveying the title to said Dunloe Hotel property and, on the 10th day of February, 1949, deposited said deed and bill of sale in escrow with the defendant California Pacific Title Insurance Company; thereupon and prior to the 17th day of February, 1949, the defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the defendant Nash Building Co., Inc., and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, executed and acknowledged before a notary public the necessary

deeds and bills of sale to transfer, convey and vest the title to the aforesaid Motel Inn property and deposited said deeds and bills of sale in escrow with the defendants California Pacific Title Insurance Company and Title Insurance and Trust Company for delivery to plaintiff.

8. On February 17th, 1949, and while the aforesaid deed and bill of sale deposited by plaintiff in escrow with the defendant California Pacific Title Insurance Company, transferring and conveying the title to said Dunloe Hotel property as hereinbefore stated, were held by said defendant title company in escrow, the defendants George H. Jovick and California Pacific Title Insurance Company notified plaintiff and represented to him that it was absolutely necessary, if plaintiff desired to complete said exchange of properties and escrow, that plaintiff forthwith authorize and direct the defendant California Pacific Title Insurance Company, in writing, to deliver or record the said deed and bill of sale, and that if the plaintiff's end of said exchange, transaction and escrow was not immediately completed, and the said deed and bill of sale delivered or recorded, the instruments transferring and conveying the title of the aforesaid Motel Inn property to plaintiff, which has been deposited with and then were held in escrow to complete the exchange transaction hereinbefore mentioned, would be withdrawn from said escrow.

9. Thereupon the plaintiff, on said 17th day of February, 1949, authorized and directed the defendant California Pacific Title Insurance Company, in

writing, to deliver or record the said deed and bill of sale deposited by plaintiff in escrow with said defendant; that said written authorization was prepared by the defendants George H. Jovick and said title company and was signed by plaintiff at their instance, request and direction, and under the circumstances and by reason of the representations made by them as to the withdrawal of escrow instruments and the imperative necessity for said authorization as in paragraph 8 of this complaint set forth and alleged.

10. (a) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendant California Pacific Title Insurance Company on the 23rd day of February, 1949, caused said deed from plaintiff to said Nash Building Co., Inc., to be recorded in Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco.

(b) As appears upon the public records of the city and county of San Francisco and as plaintiff alleges the fact to be, the defendants George H. Jovick and Leonard R. Jacobson, under and in the name of the Nash Building Co., Inc., and as the president and secretary, respectively, of said defendant company, on and prior to said 23rd day of February, 1949, had made, executed and acknowledged before a notary public, and deposited with the defendant California Pacific Title Insurance Company, and on said day the said defendant title company caused to be recorded in Book 5128 of Official Records, at page 440, a deed transferring and conveying

to one Charles Brown, a widower, the title to the same real property described in and transferred and conveyed by the aforesaid deed from the plaintiff to the defendant Nash Building Co., Inc., recorded in said Book 5128 of Official Records, at page 439, in the office of the Recorder for said city and county of San Francisco, and hereinabove mentioned and referred to; that prior to the recordation of said deeds the furniture, furnishings and equipment located and contained in or about the said Dunloe Hotel and described in and covered by the aforesaid bill of sale from plaintiff to the defendant Nash Building Co., Inc., were sold by and through the defendants George H. Jovick and Leonard R. Jacobson to three individuals, namely, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser.

(c) All the consideration for the aforesaid sale, transfer, conveyance and disposition of said Dunloe Hotel property to said Charles Brown, Louis Rosenberg, Rose Rosenberg and Mary Triebwasser, and all the proceeds derived, accruing and resulting therefrom, including a certain promissory note in the principal sum of $14,104.19, made, executed and delivered by the said Louis Rosenberg, Rose Rosenberg and Mary Triebwasser to the Nash Building Co., Inc., and secured by a chattel mortgage covering the furniture, furnishings and equipment of said Dunloe Hotel, were received and retained by the defendants including the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton; said consideration and proceeds amounted in the aggregate to upwards of $140,000.00 as plaintiff is informed

and believes and therefore alleges, and the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton receiving a substantial part thereof including the said promissory note and chattel mortgage.

11. Plaintiff alleges that by reason of the foregoing facts and circumstances, and of the terms and conditions of said exchange and trade of properties, given over and delivered or caused to be delivered all property and consideration stipulated and agreed to be given and delivered by him in exchange for said Motel Inn property and the plaintiff thereby became entitled and ever since the 23rd day of February, 1949, has been and now is entitled to receive from the defendants the necessary and proper instruments to transfer and convey the title of said Motel Inn property to him.

12. The real property which was to be transferred and conveyed to plaintiff, under the terms and in accordance with the conditions of said real estate transaction and escrow, in exchange for said Dunloe Hotel property which has been transferred, conveyed, sold and disposed of, as hereinbefore stated, is all that part of the West half of the Northwest quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, partly within and partly outside the city of San Luis Obispo, county of San Luis Obispo, state of California, and described as:

(Here follows legal description of Motel Inn property.)

13. Under and in accordance with the terms and conditions of said real estate transaction and escrow, and with the knowledge and consent of the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, the plaintiff entered into possession of said Motel Inn property, and the said defendants transferred or caused to be transferred to him the general on sale liquor license issued by the State Board of Equalization of the State of California for the sale of alcoholic beverages at said premises, and plaintiff ever since the 25th day of March, 1949, has been and now is in the actual possession and entitled to the possession of said Motel Inn property, as owner thereof, thus giving actual notice to the entire world that this plaintiff possessed and occupied the same.

14. Subsequently the plaintiff paid to the Bank of America National Trust and Savings Association, at its branch in the city of San Luis Obispo, the holder of the aforesaid deed of trust and chattel mortgage indebtedness against and upon said Motel Inn property, interest which became due thereon, to wit, $1,317.02 and, in addition thereto, $1,682.98 on account of the principal of said indebtedness; and in all other respects the plaintiff has exercised and enjoyed all rights and incidents of ownership of the said Motel Inn property, and each and every part thereof.

15. All of said defendants above named claim some right, title or interest in or to said Motel Inn property above mentioned and described, adverse to this plaintiff and his ownership of said property, both

real and personal, but plaintiff alleges that none of said defendants have any right, title or interest in or to said real and personal property or to any part thereof either in law or in equity except as subject to the plaintiff's first and superior right and estate therein, and as his trustee and agent.

16. The claims to said Motel Inn property so made by the defendants cloud the title of plaintiff thereto, and tend to depreciate the market value thereof, and tend to depreciate the market value thereof, and prevent plaintiff from handling said Motel Inn property and premises in the manner most to his interests as owner thereof.

17. The defendants California Pacific Title Insurance Company, Title Insurance and Trust Company, Nash Building Co., Inc., George H. Jovick and Leonard R. Jacobson have in their possession or under their control the conveyances to transfer and vest the title and evidence of ownership to said Motel Inn property in this plaintiff, in accordance with the terms and conditions of the aforesaid real estate exchange transaction, but said defendants have failed and refused and still refuse to deliver such conveyances and evidences of ownership to this plaintiff and, contrary to the terms and conditions of said real estate exchange transaction which has been fully performed and completed so far as this plaintiff and his property was involved therein, as hereinbefore stated, the said defendants are attempting to compel this plaintiff to pay a sum of money which he did not agree to pay and in no way is obligated to pay, as a

condition prerequisite for the delivery of such conveyances and evidence of ownership to him.

18. By reason of the premises, and of the foregoing claims, acts and refusals of the defendants to complete the real estate transaction and deliver the said conveyances and evidences of ownership to plaintiff, the plaintiff has sustained damage in the sum of $50,000.00.

19. Plaintiff is ever ready and willing to do equity and to carry out his agreements and discharge his just obligations, and upon order of court, to pay into court the amount that may be found due to any of the defendants from this plaintiff, for escrow and title insurance charges or otherwise.

Wherefore, plaintiff prays judgment as follows:

1. That the defendants John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson and Nash Building Co., Inc., to be adjudged and decreed to hold their said interest and record title to said Motel Inn property, situate in the county of San Luis Obispo, this state, as trustees for and in trust for this plaintiff, and that the said defendants be adjudged and decreed to deed or cause to be deeded and conveyed to the plaintiff Charles Tesseyman the said property subject to a deed of trust and chattel mortgage indebtedness not exceeding $46,032.19;

2. That the defendants be directed and required to deliver to plaintiff a good and sufficient deed and bill of sale of said real and personal property, and that they pay to plaintiff the sum of $50,000.00 as

and for damage plaintiff has sustained because they did not deliver such deed and bill of sale to this plaintiff when the same should have been delivered; and that in the event of their neglect or failure so to do within a time to be fixed by the court, then that the clerk thereof, acting in the capacity of a commissioner or master in chancery, be appointed, authorized and directed by the court to make, execute and deliver said deed and bill of sale of said real and personal property to plaintiff;

3. That the court take cognizance of all matters set forth in this complaint and of all the rights and equities therein concerned and adjust the same; that the defendants and each of them be required to make answer to this complaint and set forth the nature of their respective rights, claims and demands if any they have, that their rights, titles and equities, if any be found, and all adverse claims of each of said parties, be determined and adjudged subordinate and inferior to the rights and title of the plaintiff;

4. That the title of the plaintiff to said Motel Inn property, both real and personal, be quieted as against all of the said defendants, that plaintiff have judgment against the defendants jointly and severally for the sum of $50,000.00 and for his costs and for such other and further relief as equity and the exigencies of the case may require and which may be just.

/s/ Henry J. Kleefisch,
Attorney for Plaintiff.

(verification)

[Endorsed]: Filed March 10, 1950.

EXHIBIT "B"

[Title of Court and Cause.]

Answer

of Defendant Charles Tesseyman.

The defendant Charles Tesseyman makes his answer and answers to the complaint herein as follows:

2. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph numbered III of said complaint, but said defendant denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part thereof, exclusive of the excepted liquor license, is subordinate or subject to any of the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim whatsoever of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

3. Said defendant denies, specifically and generally, conjunctively and disjunctively, each and every allegation in the complaint, not herein admitted, controverted or specifically denied, except that the allegations in paragraph numbered XI as to escrow instruc-

tions are admitted. And this defendant here and now adopts as part of his answer in this behalf the complaint filed by him in this court in an action in equity relating to the real and personal property involved in and sought to be affected by the present action, and wherein this defendant is plaintiff and the said John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, Nash Building Co., Inc., George H. Jovick, their associates and privies, are defendants, and which complaint and action in equity is numbered 17745 upon the records of this court, and copies of which complaint in said action, which was pending at the time of the commencement of the present action, have been served upon the said John W. Fisher and Lurene W. Fisher, the plaintiffs herein, and the said Nash Building Co., Inc., George H. Jovick and others, insofar as the allegations in the complaint in said action No. 17745 are applicable to the defense of this answering defendant.

For a second, separate and distinct defense to the said complaint herein:

3. Defendant alleges that at the time of the commencement of this action, there was and is now pending in this court an action in equity brought by this defendant against the plaintiffs Jack W. Fisher and Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton, who are mentioned in the said plaintiffs' complaint herein and under whom they claim an interest in and to the real and personal property involved, and also the Nash Building Co., Inc., and George H. Jovick, their associates and privies, upon

and with respect to the same real and personal property and transaction and escrow mentioned and described in the complaint herein, which action is numbered 17745 upon the records of this court and is still undetermined; that the said Jack W. Fisher and Lurene W. Fisher have been served with copy of summons and complaint in said action, and this court in said equity action can do complete justice between the parties and settle and dispose of the rights, claims, equities and priorities, if any, and give effect to their contracts legally made.

4. At the time of the commencement of said action numbered 17745, on the 10th day of March, 1950, this defendant caused a notice of the pendency of said action to be recorded in the office of the Recorder for the County of San Luis Obispo, State of California, and said notice, of which a copy is attached to this answer, marked Exhibit A, and made a part hereof, was recorded in Volume 555 of Official Records, at page 201, in the office of said county recorder. That, as appears by and from the complaint in said action and as this defendant alleges the fact to be, all the matters and things involved in this action are involved in the said former action.

For a third, separate and distinct defense to the said complaint herein:

5. Said defendant admits the allegations contained in the paragraphs of said complaint numbered I, II, and IV, and that he claims some interest in the real and personal property mentioned and referred to in paragraph III of said complaint, but said defendant

denies that any interest he may have or assert, either severally or jointly with any other defendant, in or to said real or personal property, or any part of or either thereof, exclusive of the excepted liquor license, is subordinate or subject to the plaintiffs' alleged claim and right or claim or right to specific performance of the alleged agreement or any other right or claim, if any, of the plaintiffs herein, and further answering, in this connection, said defendant alleges that no agreement, written or oral, enforceable or capable of being enforced by an action for specific performance of contract appears from or is shown by the allegations of said complaint and the exhibits attached thereto, to exist as to either the said real or personal property.

6. Said defendant denies each and every allegation and statement contained in the paragraph numbered V of said complaint, and further answering the allegations and matter undertaken to be set forth in said paragraph, this defendant alleges and says that they are contrary to and are in contradiction and variance of the terms, provisions, conditions and stipulations set forth and contained in the "Escrow Instructions," attached to said complaint as Exhibit A thereto, subscribed by the plaintiffs herein.

7. Said defendant admits that the written escrow instructions attached to said complaint as Exhibits A and B thereto, were placed with the Title Insurance and Trust Company, at its branch in the city of San Luis Obispo, State of California, under its escrow number 41209, but he denies that said escrow instructions were given or so placed by the parties

thereto, or any of them, under or pursuant to the alleged agreement of sale of said real and personal property or any part thereof, as in paragraph VII of said complaint alleged.

8. Said defendant denies that Cleo S. Clinton and Loretta I. Clinton or either of them have conveyed or transferred or assigned their right or title or interest in and to the alleged or supposed agreement of sale, or to the property alleged to be covered thereby, or to any or all benefits, accrued or to accrue, from said escrow number 41209, to the plaintiffs John W. Fisher and Lurene W. Fisher, or either of them. He denies that ever since the date, if any, of the alleged transfer and assignment, the said plaintiffs have been or still are the owners, or either of them has been or still is the owner, of the said real and personal property, subject to the alleged agreement of sale. And further answering, in this behalf, this defendant alleges and says, that the said Cleo S. Clinton and Loretta I. Clinton have been and were fully paid for any and all rights, interests, estates, titles and benefits that they or either of them, at the time of said escrow, had in or to said real property and said personal property, and that they were so paid through said escrow and with funds and monies deposited and paid into said escrow by the defendants Nash Building Co., Inc., and George H. Jovick and others, for the benefit of this defendant, and therefore the said Cleo S. Clinton and Loretta I. Clinton had nothing to transfer or convey or assign to the plaintiff herein and said plaintiffs are not before this court with clean hands.

9. Said defendant answers the allegations and matters set forth in paragraph X of said complaint, as follows: He denies that possession of the Motel Inn, with or without fixtures, or the stock-in-trade, or the personal property therein located or therewith connected, was delivered to the defendant Nash Building Co., Inc., or its designated agent, if any, and he denies that they or either of them, at the time of the commencement of this action were or was in possession of said property. He denies that the cash sum of $61,840.94 has been delivered through said escrow to said plaintiffs, and alleges and says that the said sum was paid to the said plaintiffs, and the said Cleo S. Clinton and Loretta I. Clinton, and from which sum the said Cleo S. Clinton and Loretta I. Clinton have been fully paid for their right, title and interest in and to said property, as hereinbefore stated. Defendant admits all the other allegations and statements in said paragraph X contained.

10. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied, and in particular denies the precise amounts of money stated, and any lesser amounts.

For a fourth, separate and distinct defense to said complaint herein:

11. Said defendant alleges that the terms, provisions and conditions of the escrow instructions mentioned and referred to in said complaint, in all material matters and respects, including time and manner of performance by the alleged vendee, have been waived by the acts, conduct and doings of the vendor

parties thereto, including the plaintiffs herein, and the said plaintiffs are, and each of them is, estopped to assert any claim or right to specific performance, or any right or claim in respect to or affecting the said property, real or personal, under or through said escrow instructions, and in particular the said personal property because, if it is true, which is denied, that the stipulated and agreed sale and purchase price for said personal property was and is $37,500.00 then the plaintiffs and Cleo S. Clinton and Loretta I. Clinton, as the former joint owners and vendors thereof, by plaintiffs' own admission and showing in their complaint; and otherwise, have been paid and they have received through the escrow alleged in said complaint, the full amount due and payable to them for said personal property, under and pursuant to such alleged agreement of sale.

Wherefore, defendant denies that the plaintiffs are entitled to the relief prayed for in the complaint, or any part thereof, or to any other relief whatsoever against this defendant, and prays that the complaint be dismissed as to him with costs assessed against the plaintiffs, and for such other and further relief as may be just and proper.

/s/ H. J. Kleefisch,
Attorney for Defendant,
Charles Tesseyman.

(Verification.)

Exhibit A

In the Superior Court of the State of California,
in and for the County of San Luis Obispo
No. 17745

Charles Tesseyman,
Plaintiff,

vs.

John W. Fisher, Lurene W. Fisher, Cleo S. Clinton, Loretta I. Clinton, George H. Jovick, Leonard R. Jacobson, Nash Building Co., Inc., California Pacific Title Insurance Company, and Title Insurance and Trust Company,
Defendants.

NOTICE OF PENDENCY OF ACTION

To Whom It May Concern:

Take Notice that an action has been commenced in the above-entitled Court, by the above-named plaintiff, against the above-named defendants, which action is now pending; that the general object of said action is for a declaration and determination that the plaintiff is the owner, in possession and entitled to the possession of the real property and premises in the complaint in said action, and hereinafter, described, and to determine all and every claim, estate or interest therein asserted by said defendants, or either or any of them, adverse to the said plaintiff, and for other and general relief.

The real property and premises involved in, and to be affected by said action is all that part of the West Half of the Northwest Quarter of Section 25 in Township 30 South, Range 12 East, Mount Diablo Base and Meridian, and partly within and without the City of San Luis Obispo, in the County of San Luis Obispo, State of California, particularly described as follows:

"Beginning at a point on the North boundary line of the City of San Luis Obispo, as said line is defined in the Charter of said City, approved by the Legislature of the State of California, by Resolution adopted Feb. 23, 1911, distant thereon 1506.5 feet West from the Northeast corner of said City and also 16.8 feet East from a stone monument 4″x14″x10″ set in said boundary line, and running thence North 12° 16′ West, 22 feet to an iron stake set in the southerly line of the California State Highway; thence along said line on the following courses and distances, by a right curve of 430 feet radius, 73.2 feet to a concrete monument set for Sta. 1+55.7 of the official survey of said highway; thence North 68° 14′ East 236.6 feet to a concrete monument; thence by a right curve of 220 feet radius 99.6 feet to a concrete monument; thence South 85° 46′ East 119.5 feet to a concrete monument; thence by a left curve of 330 feet radius 296.6 feet to a concrete monument; thence North 42° 52′ East 44 feet to a stake; thence leaving said line of said highway and running South 0° 13′ East 234 feet to a stake on the Northerly bank of the San Luis Obispo Creek; thence along said bank South 51° 34′

West 106.2 feet; South 86° 39′ West 200 feet; South 78° 43′ West 192 feet; South 39° 22′ West 130.8 feet to an iron stake; thence leaving said creek bank and running North 12° 16′ West 333 feet to the point of beginning.

"Saving and excepting therefrom that portion thereof conveyed to the State of California for highway purposes by deed dated January 21, 1946, and recorded in Book 402 of Official Records at page 437, records of said County, described as follows:

"All that part of the portion of the West one-half of the Northwest quarter of Section 25, Township 30 South, Range 12 East, Mount Diablo Base and Meridian, conveyed to George H. Jovick by deed dated March 7, 1944, and recorded in Book 358 of Official Records at page 465, records of said County, which lies North of the following described line:

"Beginning at a point on the Northerly boundary line of the City of San Luis Obispo as said line is defined in the charter of the said City, approved by the Legislature of the State of California by Resolution adopted February 23, 1911, distant along said Northerly boundary line, Westerly 18.75 feet from the stone monument described in the above-mentioned deed as having dimensions 4″x14″x10″; thence (1) from a tangent which bears North 50° 59′ East, along a curve to the right, with a radius of 370 feet, through an angle of 17° 15′ for a distance of 111.40 feet, the Northeasterly 73.2 feet last-described course being a portion of the Northerly boundary line of the parcel of land conveyed in the above-mentioned deed; thence,

continuing along said Northerly boundary line, (2) North 68° 14′ East 236.60 feet; thence continuing along last said boundary line (3) along a curve to the right tangent to last-described course, with a radius of 220 feet, through an angle of 0° 39′ 13″ for a distance of 2.51 feet; thence leaving said boundary line (4) South 88° 55′ East, 169.36 feet; thence (5) North 85° 03′ 50″ East, 343.45 feet to a point on or near the Easterly boundary line of the parcel of land described in the above-mentioned deed distant South 20° 03′ 50″ East, 88.59 feet from a concrete monument set at the Southwesterly terminus of the course described as 'North 42° 52′ E., 44 ft.,' in last said deed; thence (6) continuing North 85° 03′ 50″ East, 100 feet.''

Dated: March 6th, 1950.

H. J. Kleefisch,
Attorney for Plaintiff.

(Affidavit of service by mail.)

[Endorsed]: Filed July 26, 1950.

[Endorsed]: Filed March 17, 1954.